Supreme Court, U. S.
FILED
SEP 26 1975

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1559

JAMES P. LINN,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER JAMES P. LINN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September, 1975

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This brief is respectfully submitted in reply to the Memorandum for the United States in Opposition and addresses itself to arguments first raised in said memorandum in opposition under Rule 24 of the Supreme Court Rules.

1. Petitioner's primary concern, notwithstanding the Solicitor General's statement at page 4 of his memorandum to the contrary, is with his privacy and the continuing existence of potentially damaging records which serve no compelling legitimate function. The question is not whether there are special or unusual circumstances in this case to

justify expungement of petitioner's arrest record, it is more fundamental than that. The question which petitioner has now presented through three levels of federal courts and which the Government has ignored to date is the question of a right of privacy, free of unreasonable restraints. Is there a compelling state interest in retaining the arrest records of the individual acquitted of the crime with which he was charged?

The Solicitor General states beginning at page 3 of his memorandum:

> "The mere fact that petitioner was acquitted of the offenses with which he was charged is not a sufficient reason, since an acquittal does not necessarily reflect upon the validity of the arrest but means only that the defendant's guilt was not established beyond a reasonable doubt. See, e.g., *United States* v. *Dooley*, 364 F.Supp. 75, 78 (E.D. Pa.)."

Petitioner can find no support for such a statement in the *Dooley case*. In point of fact, the *Dooley* case presents strong language in support of the petitioner's position and the court determined not to expunge the arrest record only because of the practical administrative inconvenience on the bureaucracy if the stage were set for expungement in similar cases. *United States* v. *Dooley*, 364 F.Supp. at 79. That court states in 364 F.Supp. at 77:

> "Unresolved arrest records generally may well have significance for law enforcement purposes. They provide legitimate leads and questionable background information and may properly assist in resolving criminal actions. But charges resulting in acquittal clearly have no legitimate significance. Likewise, other charges which the government fails or refuses to press or which

> it withdraws are entitled to no greater legitimacy. They lose any tendency to show probable cause and should not be boot-strapped into any unearned and undeserved significance. Actually, a collection of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standards of constitutional fairness to an individual and, along with records resulting in an acquittal are not entitled to any legitimate law enforcement credibility whatsoever."

And beginning at page 78:

> "Even assuming that the adverse information never falls into 'unauthorized' hands, the fact remains (1) that the information is valueless if its retention is based upon some theory of law enforcement assistance to the police at any level since it has been determined to be unfounded in law; (2) that it cannot form the basis for any legitimate law enforcement investigation; (3) that the use of this information by 'authorized' agencies would place the subject person at a distinct disadvantage with other citizens; (4) that the use of the information would of necessity be prejudiced specifically to the rights of the subject person as compared with the rights enjoyed by all other citizens; (5) and that such an unfair state of affairs is devoid of fair play, a violation of the constitutional right of privacy as well as of the presumption of innocence and is an affront to our sense of justice.
>
> "Any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances could find himself charged with a violation of the law even though he may be entirely innocent of the charges. Our system of criminal justice will in due course bring out the truth and he will be cleared. But his record will not be cleared. And although he has been cleared under our laws, at any

future time the cloud of the prosecution against him will remain to all who one way or another gain access to it: be it inquiries concerning employment, security clearance, political office or investigations concerning other criminal offenses.

"And whether or not the information is disclosed, the fear of the subject person that it will be or may be is always there."

Petitioner contends that *Tarlton* v. *Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), cited several times in the Solicitor General's memorandum, is not controlling on any issue presented by the petitioner for a writ of certiorari. The court in *Tarlton* stated that "the issue of constitutional restraints on dissemination is yet to be definitely adjudicated and we, therefore, express no opinion on that issue." 507 F.2d at 1121, fn. 8.

Even a cursory reading of *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971), will reveal that petitioner's reliance is not misplaced and the distinctions drawn by the Solicitor General are illusory. The question before the Washington court in *Eddy* was whether the Seattle police could retain Harriet Eddy's fingerprint records and photographs after charges against her had been dismissed. The court in the *Eddy* case illustrated the development of the right of privacy in police records—including, but not limited to, the early development of the "rogue's gallery" photograph aspect of arrest records. The Washington court also showed development in the concept of a constitutional right of privacy, and made the following pertinent observation:

"The challenge is to determine the dimensions of that right. Few things have been as basic to our legal system as the presumption of innocence, until proof of guilt beyond a reasonable doubt. In fact, the very word acquittal is defined to mean 'judicially discharged from an accusation, * * * charge, or suspicion of guilt.' 1A Words and Phrases, p. 579 (perm. ed. 1964)." *Eddy* v. *Moore*, 487 P.2d at 217.

With its general discussion as background, the court then defined the question before it in 487 P.2d beginning at page 215:

"We here deal with the question, not ruled upon by [Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970)], of the legality of the existence of a record of an acquitted person's fingerprints and photographs in police files. The determination of that question, in turn, hinges directly on whether there is a constitutional right of privacy in an acquitted person's fingerprints and photographs."

While the Washington court cited *Menard* v. *Mitchell* (*supra*) and *United States* v. *Kalish*, 271 F.Supp. 968 (D.P.R. 1967), it was only to support the proposition that "following an acquittal, the scales of justice required the balancing on one side of a plaintiff's legitimate concern over the improper use of, labeling, or existence of his fingerprints, photographs, and arrest records against the Government's bald assertion of a right to hold them." *Eddy* v. *Moore*, 487 P.2d at 217.

The Solicitor General implies in his memorandum that petitioner has a remedy if unlawful dissemination is made. Petitioner can complain to the F.B.I., if he can find out who provided the information, by reporting the disseminating agency and requesting its access privileges be terminated. Barring the unlikely event that the user would disclose

who provided the records, in practical terms, it would be impossible to determine which one of the 7,000 to 8,000 agencies with access to the F.B.I. files disseminated the records. This is of little value to the individual in redressing a wrong done to him or protecting his privacy. This "remedy" is somewhat analogous to that of closing the barn door after the horse is gone.

The practice of law is a sensitive area requiring the absolute trust and confidence by a client in his legal representation. Where the average person on the street requiring legal advice or representation would probably not seek or receive criminal arrest files, large corporations, banks, government organizations and individuals with the right kind of connections do have means at their disposal, legal and otherwise, to secure such files with little difficulty. A security officer of a corporation stated in an interview regarding his company's employment practice:

> "On the whole * * * if we could pay the fee of approximately two dollars per record search * * * I believe most police and sheriff's agencies would provide us with a rap sheet. We keep a list of all those police or sheriff's departments throughout the country that will or will not reply without a fee to our letter." "Guilty by Record," 1 *Calif. Western Law Review* (1965), 126 at 132.

2. The Solicitor General in his memorandum in opposition maintains that an evidentiary hearing was not required because petitioner did not indicate to the district court that he had additional evidence to present; and that petitioner did not indicate in his petition for rehearing to the United States Court of Appeals for the Tenth Circuit what further relevant evidence he was prepared to present.

The Court of Appeals deemed evidence of damage to the petitioner and a demonstrated invasion of privacy of sufficient import to the outcome of the controversy, by its reliance on the lack thereof, to deny the relief requested (Pet. App. A, pp. v-vi). The district court, on the other hand, presumedly deemed such evidence unnecessary to a proper determination of the controversy since it made no formal or informal response to the petitioner's request for an evidentiary hearing, and by its failure to note any grounds for its order other than a review of the briefs and reported federal opinions (Pet. App. C, p. viii). The Solicitor General's Memorandum in Opposition seems to support both the position that the hearing was unnecessary *and* that based on the facts the relief should be denied. The Solicitor General also interjects yet a third position by contending that disclosure by the petitioner of what evidence he was prepared to present would somehow be relevant to the determination of whether a hearing should have been considered (Memo. in Opp., p. 7), yet cites no authority for such a proposition.

It has been the petitioner's position that if a court determines that the controversy is not solely a question of law, then an evidentiary hearing should be granted for a just adjudication of the case, not by mere statements in briefs and exhibits attached to briefs on appeal (See Petition for Rehearing, Pet. App. E, p. xii). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385 (1914). There should be an "opportunity for hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), whether it be raised

in a question of sufficiency of notice and service [*Mullane* case (*supra*)], the availability of the judicial system to those requesting relief, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), or the necessity of an evidentiary hearing as in the controversy in question.

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

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September, 1975

CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of September, 1975, three true and correct copies of the foregoing Reply Brief of Petitioner in Support of Petition for Writ of Certiorari were mailed air mail, return receipt requested, to each of the following: The Solicitor General, Department of Justice, Washington, D.C. 20530; Charles R. Holden, Attorney and Gary D. Jackson, Attorney, Department of Justice, Box 14142, Washington, D.C. 20044.

The listed parties are all of the parties required to be served.

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James P. Linn